Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in New Jersey	)))))))))	CC Docket No. 01-347

COMMENTS OF
XO COMMUNICATIONS, INC.

Andrew D. Lipman
Patrick J. Donovan
Ronald W. Del Sesto, Jr.
Swidler Berlin Shereff Friedman, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (Telephone)
(202) 424-7643 (Facsimile)

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SUMMARY

At the time Verizon filed its application, the New Jersey Board of Public Utilities ("NJ BPU") had not voted to approve Verizon's proposed entry to the long distance market in that state and even now the text of its decision has not yet been released. The Commission should require Verizon to re-file its application and restart the 90-day clock when the NJ BPU order is released in order to permit a meaningful evaluation of a complete record.

Verizon has failed to meet its reciprocal compensation obligations under NJ BPU-approved interconnection agreements. Verizon has engaged in unilateral, illegal behavior to reduce reciprocal compensation payments to XO Communications, Inc. ("XO"). Additionally, Verizon has unlawfully attempted to impose new modifications to its interconnection agreement with XO by claiming that the *FCC Reciprocal Compensation Order* is self-effectuating. A number of state commissions have rejected Verizon's interpretation yet, undeterred, Verizon continues to push this issue simply because it has the market power to do so.

In addition, Verizon does not provide non-discriminatory access to directory listings. Verizon subjects CLEC directory listings to a retyping process that it does not do for its own retail customers, which inevitably results in lost or erroneous listings for CLEC customers.

Aside from failing to satisfy the Section 271 checklist requirements, granting Verizon's application would be inconsistent with the public interest. Verizon's newly established rates for "hot cuts" establish a "price squeeze" in the retail telecommunications services market. As set out in the D.C. Circuit's recent opinion

concerning Sprint's appeal of the grant of Section 271 authority to SBC Communications, Inc. in Kansas and Oklahoma, the Commission must scrutinize rates as part of the public interest test of Section 271. There is no reasonable basis that can justify Verizon's effective rates for "hot cuts."

Verizon's Section 271 application also fails the public interest test due to its declaration of *"force majeure"* in New Jersey. While there is no question that the devastating September 11, 2001 terrorists attacks negatively impacted the telecommunications infrastructure, it would be highly inappropriate and arbitrary for the Commission to grant Section 271 authority at a time when Verizon, in effect, claims it does not have to comply with checklist requirements.

XO joins the New Jersey Ratepayer Advocate in calling for the creation of a state universal service fund as a precondition to satisfying the public interest requirements of Section 271. Further, the Access New Jersey Program must be eliminated prior to granting Verizon authority to provide interLATA services. The Access New Jersey Program allows Verizon to offer discounted services to schools and libraries that facilities-based CLECs are not able to participate in. The discount is not made available to facilities-based CLECs.

Verizon also has constructed artificial barriers for CLEC-to-CLEC migrations. Rather than adopting a simple, streamlined procedure, Verizon requires CLECs to conform to a process that adds 7 to 10 extra business days in order to accomplish a simple migration. If the New Jersey market is to become competitive, CLEC-to-CLEC migrations must be accomplished efficiently. Verizon's practice of impeding CLEC-to-CLEC migrations should disqualify it from Section 271 approval.

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(d/b/a Verizon Long Distance),	)	
NYNEX Long Distance Company	)	
(d/b/a Verizon Enterprise Solutions),	)	CC Docket No. 01-347
Verizon Global Networks Inc., and	)	
Verizon Select Services Inc., for	)	
Authorization To Provide In-Region,	)	
InterLATA Services in New Jersey	)	

COMMENTS OF XO COMMUNICATIONS, INC.

XO Communications, Inc.,[1] through undersigned counsel, ("XO" or "the Company") submit these comments in response to Verizon New Jersey's application for authority to provide in-region, interLATA services in New Jersey. For the reasons stated below, the Commission should deny Verizon's application for 271 authority for the State of New Jersey.

[1] XO Communications, Inc. is the parent of XO New Jersey, Inc. which is a New Jersey certificated Competitive Local Exchange Carrier. Throughout these comments, references to "XO" collectively refer to XO Communications, Inc. as well as XO New Jersey, Inc.

I. VERIZON'S APPLICATION IS PREMATURE

XO emphasizes that it is very inefficient and prejudicial to Verizon competitors for the Commission to consider the above-captioned application prior to the time that interested parties are able to evaluate the New Jersey Board of Public Utilities ("NJ BPU") decision regarding Verizon's 271 application. While the NJ BPU has reportedly approved Verizon's application, the ruling has not been released, denying interested parties an opportunity to consider the NJ BPU's analysis and to integrate into these comments whatever additional issues may arise as a result of the NJ BPU's decision. By filing before the NJ BPU had even acted, Verizon has effectively short-circuited the industry's ability to fully evaluate Verizon's application. The Commission should reject Verizon's application and require it to re-file after the date that the NJ BPU releases its recommendation.

II. VERIZON DOES NOT COMPLY WITH CHECKLIST ITEM 13

Section 271(c)(2)(B)(xiii) of the Act requires that a BOC enter into "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)."[2] With respect to the Massachusetts application, the Commission required a showing that Verizon is "providing reciprocal compensation under the obligations in its Department [MA DTE]-approved interconnection agreements and tariffs, as well as relevant Department Orders" to find compliance with Checklist Item 13.[3] As explained below, Verizon does not comply with these requirements.

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2 47 U.S.C. § 271(c)(2)(B)(xiii).

3 *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and* (continued)

A. *Verizon Does Not Comply With Its Contractual Reciprocal Compensation Obligations in New Jersey*

Rather than meeting its reciprocal compensation obligations under NJ BPU-approved interconnection agreements, Verizon has engaged in a pattern of illegal self-help methods against XO to reduce its reciprocal compensation payments under that agreement and a predecessor agreement with NEXTLINK (XO's predecessor). XO adopted a preexisting interconnection agreement between Bell Atlantic New Jersey and MCImetro Access Transmission Services, Inc.[4] Although XO has billed Verizon in compliance with the terms of the interconnection agreement between the parties in New Jersey, Verizon has sent several letters to XO disputing the amount of reciprocal compensation owed to XO, and refusing to make required payments under the Parties' agreement. Verizon's sole basis for refusal was based on its own unilateral, unsubstantiated determination of required payments, in total disregard of the requirements of the interconnection agreement and statutory requirements.[5]

In the NJ BPU's 271 proceeding, Verizon attempted to characterize this dispute as related to "reciprocal compensation for Internet-bound traffic," however, there has been no factual or legal determination that the usage at issue is Internet traffic save for

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Verizon Global Networks, Inc. for Authorization to Provide In-Region, InterLATA Services in Massachusetts, CC Docket No. 01-9, Memorandum Opinion and Order, FCC 01-130, ¶ 215 (Apr. 16, 2001) ("*Verizon MA 271 Order*"), at ¶ 216.

[4] *See Consultative Report on the Application of Verizon New Jersey Inc. for FCC Authorization to Provide In-region, InterLATA Service in New Jersey,* New Jersey Board of Public Utilities Docket No. TO01090541, Verified Statement of Craig Plue On Behalf of XO New Jersey, Inc. at ¶ 13 (October 19, 2001) ("*Plue NJ Declaration*"); *see generally, Consultative Report Application of Verizon-New Jersey Inc. for FCC Authorization To Provide In-region, InterLATA Service in New Jersey,* New Jersey Board of Public Utilities Docket No. TO01090541 ("*NJ 271 Docket*").

Verizon's self-serving, and unilateral, determination that it is Internet traffic.[6] In 1999, Verizon sent a letter to NEXTLINK (XO's predecessor) stating that it was refusing to pay reciprocal compensation on Internet-bound traffic and was defining Internet-bound traffic "conservatively" as traffic "in excess of a 2 to 1" traffic ratio.[7] Verizon did not offer any support in law or fact for such a ratio.[8] Verizon admitted in the hearing before NJ BPU on its 271 application that this ratio was "just done unilaterally by Verizon."[9] It is hard to imagine a more candid admission that Verizon is ignoring the requirement that it comply with reciprocal compensation obligations in state-approved interconnection agreements.

Verizon claimed that the 2:1 ratio is a rebuttable presumption, but Verizon has appointed itself as the sole arbiter of this presumption. Verizon admitted that there is no clear procedure or established burden of proof to rebut the presumption.[10] The reality is that XO could only rebut the presumption if Verizon deigned to accept the evidence presented by XO. If Verizon chose not to accept the evidence, it would only pay in accordance with the 2:1 ratio.[11] The arbitrary nature of Verizon's actions is seen in the contrasting situation presented in New York. In New York, the New York Public Service Commission applied a 3:1 rebuttable presumption ratio after extensive proceedings on the

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[5] *See Consultative Report on the Application of Verizon New Jersey Inc. for FCC Authorization to Provide In-region, InterLATA Service in New Jersey,* New Jersey Board of Public Utilities Docket No. TO01090541, Initial Brief of XO New Jersey, Inc. at 4 (December 7, 2001) ("*XO NJ Brief*")

[6] *See id.* at 5.

[7] *See id.*

[8] *See Plue NJ Declaration* at ¶ 15.

[9] *Application of Verizon New Jersey, Inc. et al. for Authorization to Provide In-Region, InterLATA Services in the State of New Jersey*, CC Docket No. 01-347, at Appendix B, Tab 6, Tr. 440: 16-17 (filed Dec. 20, 2001) ("*Verizon NJ 271 Application Appendix B, Tab 6"*).

[10] *See Verizon NJ 271 Application Appendix B, Tab 6,* at Tr. 483: 9-15.

[11] *See id.* at Tr. 484: 12-15.

issue. The PSC retained the role as the ultimate arbiter of whether evidence presented by a party is sufficient to rebut the presumption.[12]

What is particularly disturbing about Verizon's actions is its utter disregard for pursuing the proper avenues to implement its view concerning its reciprocal compensation obligations. Verizon ignored the express language of its interconnection agreement that "Parties shall negotiate promptly and in good faith in order to amend the Agreement . . . ."[13] If Verizon was interested in changing the reciprocal compensation requirements it should have negotiated an agreement with XO.

In view of the foregoing, Verizon is clearly not meeting its reciprocal compensation obligations under NJ BPU approved interconnection agreements, and, is therefore not in compliance with Checklist Item 13. What is worse, if the Commission finds Verizon's actions to be compliant, it will provide incentive for other RBOCs to unilaterally and unlawfully recast their reciprocal compensation obligations.

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[12] *See Reexamine Reciprocal Compensation*, NY PSC Case No. 99-C-0529, Opinion No. 99-10, 1999 WL 1020550, *28 (1999). Verizon attempted to characterize its 2:1 ratio as a "ruling" despite the fact that NJ BPU staff had proposed adoption of a 3:1 ratio that had not yet been implemented. *See Board Investigation Regarding Intercarrier Compensation for Internet Service Provider (ISP) Bound Traffic,* NJ BPU Docket No. TX99110844. The NJ BPU, however, has not issued a final order in this matter. Thus, the interconnection agreement rates still apply. Verizon admits its use of the word "ruling" was a poor choice of words and that far from being a "ruling" it simply reflected its own position. *See Verizon NJ 271 Application Appendix B, Tab 6*, at Tr. 479: 23-25. At the very least, Verizon's characterization was deceptive.

[13] *XO NJ Brief* at 7 *citing* Section 24.1 of ICA. In its arbitration hearing with Cablevision, Verizon admits it does not even know how a party would rebut the rebuttable presumption.

B. *Verizon's "Self-Effecting" Application of this Commission's Reciprocal Compensation Order Does Not Comply With Section 271 Requirements*

Verizon has also unilaterally implemented provisions of the *FCC Reciprocal Compensation Order*[14] to unlawfully reduce its payments to XO effective June 14, 2001.[15] Once again, disregarding its legal obligations to negotiate with XO any amendments to the interconnection agreement,[16] Verizon has attempted to unilaterally amend the agreement by claiming that the *FCC Reciprocal Compensation Order* is "self-effecting."[17] This action also directly contravenes the language of the Order that the order is not self-effecting but rather is subject to change of law provisions in parties interconnection agreements.[18] The FCC explicitly stated that its determination does not "alter existing contractual obligations."[19]

Verizon claims that the change of law language in its existing interconnection agreement with XO is merely there for "housekeeping" purposes and that Verizon can implement this change without an amendment.[20] This attitude speaks volumes about Verizon's disregard for contractual language and legal obligations that arise therefrom.

[14] *See In the matters of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Order on Remand and Report and Order, FCC 01-131 (Released April 18, 2001) (the "*FCC Reciprocal Compensation Order*").

[15] *See XO NJ Brief* at 7.

[16] In contrast, Verizon has refused to implement other FCC orders that benefit XO without an approved interconnection agreement. For example, Verizon refused to make dark fiber 2-way trunking available without amendments. In addition, Verizon refused to implement collocation changes, remote terminals and line sharing without amendments.

[17] *Id.*

[18] *See generally FCC Reciprocal Compensation Order*.

[19] *Id.* at ¶ 82.

[20] *See Verizon NJ 271 Application Appendix B, Tab 6*, at Tr. 494: 6-10.

Verizon attempts to invoke Attachment 1, Section 1.1 of the parties agreement that allows for changes in rates as authority for such an unilateral change.[21] That provision specifies, however, that new rates go into effect only after any appeals of the order implementing the new rates are completed. There are numerous pending appeals of the *FCC Reciprocal Compensation Order*.[22]

One state commission has already repudiated Verizon's stance. The Maryland Commission rejected Verizon's view, finding that the Commission's Order was not "self-executing" and concluding that the interim compensation regime could only be implemented by invoking change-of-law provisions.[23] Verizon was directed to negotiate amendments to existing interconnection agreements,[24] and was also precluded from withholding reciprocal compensation payments until the amendments to the agreements are approved by the Maryland Commission.[25]

The Public Utilities Commission of California recently rendered a similar decision.[26] The California PUC noted that until existing contracts expire, "carriers

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21 *See XO NJ Brief*, at 9.

22 *See id.*

23 Maryland Public Service Commission, Letter from Executive Secretary to Counsel for CoreCommunications, Inc. and Verizon Maryland Inc. at 2 (June 13, 2001).

24 Such an amendment would involve more than a simple ministerial act. The parties need to address, among other issues, the effective date of the amendment, and the actual payment structure – which will differ depending on whether a CLEC accepts or declines Verizon's offer to exchange all traffic at the same rate. The amendment will also need to address the parties payment obligations in the event the Commission's order is reversed, vacated, or set aside on appeal.

25 *See id.*

26 *See Order Instituting Rulemaking on the Commission's Own Motion Into Reciprocal Compensation for Telephone Traffic Transmitted to Internet Services Providers Modems,* CA PUC Rulemaking 00-02-005, Opinion on Pac-West Motion on Implementation of FCC Order on Internet Traffic, Decision 01-11-067 (Nov. 29, 2001)

remain subject to ISP reciprocal compensation provisions in existing contracts."[27] The CA PUC added:

> [A]ccordingly, we conclude that Verizon has taken an overly broad interpretation of its unilateral decision to implement the FCC rate caps immediately in all of its interconnection agreements merely by sending a letter to interconnecting carriers stating its intention to do so. The capped rates may be applied to previously existing contracts only to the extent that under the pricing terms in such contracts, parties are entitled to invoke change-of-law provisions. This Commission retains jurisdiction to enforce compliance with the reciprocal compensation terms of existing interconnection agreements that do not contain change-of-law provisions.[28]

Verizon has not negotiated with CLECs, and/or filed for approval, interconnection amendments with the NJ BPU to implement any portions of the *FCC Reciprocal Compensation Order*. Once again this is a clear violation of NJ BPU-approved interconnection agreements in regard to reciprocal compensation and provides a further basis for finding non-compliance with Checklist Item 13.

III. THE COMMISSION SHOULD NOT GRANT VERIZON'S APPLICATION UNTIL VERIZON IMPROVES ITS PROVISIONING OF DIRECTORY LISTINGS

Verizon's application to provide in-region, interLATA services in the State of New Jersey should be denied because Verizon has failed to satisfy checklist item number 8 as set out in Section 271(c)(2)(B)(viii) of the Act. Checklist item number 8 requires Verizon to provide directory listings at parity with the manner in which Verizon provides these services to its own retail customers. While Verizon maintains that it processes listing service order data for CLEC customers and Verizon's New Jersey retail customers

27 *Id.* at 11.

28 *Id.* at 11-12.

in the same manner, Verizon conveniently fails to note that CLEC listing information is subject to retyping in certain circumstances which is not the case for Verizon retail customers.

CLECs can submit directory listing orders to Verizon in two ways – as part of a Local Service Request ("LSR"), which may be for resale or include an order for UNEs, or as a stand alone Directory Service Request ("DSR"). In both cases, the CLEC submits its order through Verizon's Web GUI or EDI. However, the manner in which Verizon processes the order depends on whether it meets Verizon's criteria for "flowthrough" or automatic processing.

Verizon has arbitrarily determined that the following orders must be processed manually: (1) orders involving customer migration from Verizon's facilities to a CLEC's facilities; (2) orders affecting more than six lines; (3) orders requiring directory listing change, or; (4) orders that are otherwise "complex" (*e.g.*, both voice and data). By requiring manual processing of directory listings in these circumstances, Verizon deliberately subjects CLECs' directory listings to a course of action that allows for numerous typographical mistakes, omissions, inaccuracies and other errors to arise needlessly when customers migrate from Verizon to CLECs and that eliminates parity treatment for CLECs.

The practical effect of requiring manual processing in these instances is that only a small percentage of orders submitted by CLECs are automatically processed by Verizon's ordering system. A large majority of the orders are manually processed by Verizon's National Marketing Center in Newark. Manual processing requires a Verizon employee to retype the directory listing information from the LSR or DSR onto the

Service Order before the directory listing information is transmitted to Verizon's directory listing organization, Verizon Information Service.

The inaccuracies caused by manual processing of directory listing are exacerbated when facilities-based CLECs submit directory listings. Since Verizon has unilaterally imposed an arbitrary threshold that requires retyping of directory listing information on orders of six (6) or more lines, Verizon has created a significant opportunity for error when facilities-based CLECs submit entries which is not present for Verizon retail customers. The practical, discriminatory effect of Verizon's directory listings process is that it disproportionately results in more errors for facilities-based CLECs and their business customers than for CLECs utilizing UNE platform and resale, and for Verizon's retail customers. Since directories are only published once a year, CLECs do not have the opportunity to correct such errors for a substantial period of time. Errors in CLEC listings that last as long as a year harms CLECs and their customers, while allowing Verizon to maintain and increase its market share.

Moreover, the problems inherent in Verizon's processing of directory listing orders affect both "as is" directory listings and "as specified" directory listings. Directory listings designated "as is" are listings that the CLEC customer wishes to retain with no changes from the way that they are currently listed in Verizon's directory. Conversely, "as specified" directory listings are those that the CLEC customer wants to change from the way in which they appear in the directory. Since "as is" directory listings do not require any revisions, there is no reason such listings should contain any errors. However, many "as is" listings are frequently plagued by omissions and errors.

Verizon's current ordering process does not allow for automatic processing of "as is" directory listing requests under certain circumstances. For example, where the migrating customer utilizes more than six lines, or has a "complex" order, or will be served over a UNE loop, Verizon does not allow for automatic processing of an "as is" directory listing. In each of these cases, Verizon removes the customer's existing directory listing information from its database and manually retypes that information on the CLEC's service order for transmission to Verizon Information Services.[29] The manual reentry process not only introduces the potential for numerous errors, but frequently results in omitted or inaccurate listings.

The situation is much worse for "as specified" directory listings. Directory listings that are "as specified" provide even greater opportunities for Verizon errors and omissions. All "as specified" directory listings are manually retyped, even if the revision involves a minor change in only one line of the customer's listing.[30] If a CLEC submits an order and indicates that the directory listing is to be modified, Verizon deletes the existing listing and manually retypes the directory information from the CLEC's LSR or DSR. Applying manual processing to CLEC submitted orders greatly increases the possibility of error in the preparation of directory listing information on a CLEC's service

[29] In contrast, an "as is" request that involves only resale service, local number portability, a UNE loop with number portability, or less than six lines, is automatically processed without manual intervention by Verizon personnel.

[30] Likewise, orders for new CLEC customers that were not previously served by Verizon must be completely retyped by Verizon's National Marketing Center personnel prior to transmission of the service order to VIS. Therefore, orders for new CLEC customers present a significantly greater possibility of being omitted or inaccurately listed in the white pages directory.

order and requires the CLEC to expend significant time and resources to identify and correct such errors.

Verizon attempts to brush aside such concerns by claiming that Verizon's National Marketing Center staff, who are responsible for retyping the listing information, are trained. However, aside from the fact that manual processing will always be subject to a certain amount of human error, Verizon cannot always hire the most qualified personnel. Thus, manual processing results in riddling a CLEC customer's directory listing information with errors, causing the CLEC to expend a great deal of time and resources to identify and correct the errors prior to directory publication.[31] Far from providing directory listings at parity with its retail customers, it is XO's understanding that directory listing information for Verizon's own retail customers is not typed twice (once by the CLEC and once by Verizon), but are instead processed upon initial typing (by Verizon) and entered into Verizon's directory listing database. Until Verizon allows CLECs to follow the same directory listing processing procedures that Verizon follows for its retail customers, the Commission must find that Verizon has not satisfied checklist item number 8.

The Commission should also be aware of the fact that the Directory Listings Verification Report was outside the scope of the test performed by KPMG Consulting. No Verizon error has more of a long lasting effect on competition then directory listing errors because the directory is only published annually and the potential for inaccurate

[31] The limited opportunity for review and correction of such errors combined with the short amount of time between the CLEC's first opportunity to review its directory listing information and the deadline for publication of the directory create additional burdens on CLECs and, in many cases, result in last minute corrections that often do not make it into the published directory.

listings result in customers resisting a change in their service provider for fear that their business or residence directory listing will contain inaccurate information.

IV. VERIZON HAS FAILED TO PROVISION UNBUNDLED LOOPS IN A REASONABLE AND NON-DISCRIMINATORY MANNER

A. The Commission Must Deny Verizon's 271 Application Until Verizon Stops Imposing Arbitrary Rules Regarding the Ordering of High Capacity Unbundled Network Elements

Prior to granting Verizon's application to provide in-region, interLATA services in the State of New Jersey, Verizon must stop constructing artificial barriers that impede the efforts of XO and other CLECs to order high capacity Unbundled Network Elements ("UNEs"). For example, Verizon will not accept orders for high capacity UNEs from XO in New Jersey because it claims, without any basis in fact, that XO's personnel are not adequately trained in submitting these orders. This anti-competitive practice effectively denies XO the ability to order high capacity UNEs and demonstrates that Verizon has failed to meet checklist items 2, 4 and 5.

The Commission should take note that Verizon has not identified specific errors on any XO high capacity UNE orders, or offered any specific technical reasons why such orders cannot be submitted without testing in New Jersey. Verizon's excuse for not processing UNE orders is its claim that the parties agreed to work on test orders, which XO denies. Verizon's practice of insisting on testing and reviewing only test orders before live orders will be accepted has created an unnecessary and unreasonable obstacle and delays XO's delivery of services to New Jersey customers. Verizon cannot claim to have satisfied Section 271 of the act when it continues to thwart CLECs attempts to obtain high capacity loops.

B. *Verizon's Practice of Responding to CLEC UNE Orders With "No Facilities" violates Checklist Item 2 – Non-Discriminatory Access to Network Elements*

Verizon has adopted a policy of rejecting UNE orders by claiming that facilities are "unavailable." CLECs' orders are rejected in instances where the installation of a line card or other minor electronics would allow Verizon to provide the requested facilities. Verizon's failure to take simple steps in order to fill CLEC's UNE orders is another example of Verizon impeding the development of a competitive market for local exchange telecommunications services nature.

Rather than taking corrective actions, Verizon defends its anti-competitive practice by claiming that this is not a new policy but a restatement of the existing policy.[32] In adopting its "no facilities" policy, Verizon relies on its interpretation of the Eighth Circuit holding by stating that unbundling requirements only apply Verizon's existing network.[33] Whether this position is legally tenable or not, it is irrelevant because CLECs do not require Verizon to construct new facilities in order to access such UNEs. Rather, CLECs require nondiscriminatory access to the existing network elements. Neither the Act nor the Eighth Circuit decision provides Verizon with a legitimate basis to refuse to provision UNEs because some minor modifications are required to its network.

Verizon would prefer to be able to continue its practice of simply responding "no facilities" rather than provide CLECs with the necessary UNEs. However, other ILECs

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[32] *See NJ 271 Docket*, VNJ-4, ¶ 63, Tr. 803:24-25. Verizon's policy "restatement" was issued on July 24, 2001, a little over a month after filing for Section 271 authority in Pennsylvania. Verizon has claimed that this issue is inappropriate for a 271 proceeding. *See NJ 271 Docket*, VNJ-5, ¶¶67-68.

[33] *See NJ 271 Docket,* Ex. Tr. 809:21-25.

that have engaged in this anti-competitive behavior have been reined in by state regulatory agencies. For example, Ameritech attempted to engage in the same behavior but both the Illinois Commerce Commission and the Michigan Public Service Commission established a definition of "no facilities."

The state regulatory agencies in Illinois and Michigan have concluded that the ILEC's unbundling obligations include the requirement to perform some construction to provision the requested UNE.[34] The Federal District Court for the Eastern District of Michigan upheld the Michigan Order requiring Ameritech to provision loops where some construction was required.[35] Illinois also recognizes that some work might be required to provision a UNE to a CLEC. Prior to receiving Section 271 authority in New Jersey, Verizon must adopt a consistent policy of what constitutes a "no facilities" response supported by the law. Verizon's current application of its "no facilities" policy does not comply with the competitive checklist set out in Section 271 of the Act.

Verizon also attempts to use this policy to charge higher prices for UNEs. While Verizon has advised XO that it is under no legal obligation to build new UNE facilities to fulfill XO orders, Verizon has also advised the Company that they will build such facilities if XO withdraws its UNE order and submits an order for the same circuits out of Verizon's federal or state tariff as a special access service. The inevitable result of this practice is that XO is forced to pay the higher, non-TELRIC rate for the circuit. By

[34] *In the Matter of Complaint of BRE Communications, L.L.C., d/b/a Phone Michigan for violations of the Michigan Telecommunications Act,* Case No. U-11735, February 9, 1999 ("Michigan Order") and *Illinois Commerce Commission On Its Own Motion v. Illinois Bell Telephone Company Investigation of Construction Charges,* Docket 99-0593, August 15, 2000 ("Illinois Order").

[35] *Michigan Bell Telephone Co., d/b/a Ameritech Michigan, Inc. v. Strand et al.,* Case No. 99-CV-71180-DT (E.D. Mich. Jan. 4, 2000).

insisting that XO withdraw its UNE orders in those circumstances, and resubmit the order as a special access service request, Verizon manages to avoid the required performance standards and remedies in place for UNE services in New Jersey and distort the metrics that measure its performance in New Jersey. Unfortunately, in order for XO to provide timely service to customers and even attempt to compete with Verizon in New Jersey, XO is forced to acquiesce to Verizon's unreasonable demand and purchase the higher priced special access services. Verizon's "no facilities" policy is anti-competitive and discriminatory. The Commission must not grant Verizon's application to receive authority to provide interLATA services at this time.

C. Verizon's Pricing For "Hot Cuts" Thwarts Competition

The Commission has previously determined that Verizon must demonstrate it provides unbundled loops through hot cuts "in a manner that offers an efficient competitor a meaningful opportunity to compete."[36] Accordingly, the prices for hot cuts must be set at a level that permits CLECs as a business matter to transfer ILEC customers to the CLEC. Verizon's recently approved rates for hot cuts in New Jersey are well above the level that would allow competition. As a result, Verizon fails to satisfy checklist item number 4, nor can it meet the public interest requirement of Section 271.

A "hot cut" is a migration order. The end user is migrating or transferring its service from Verizon to the CLEC or from one CLEC to another. In the service negotiations before the order is even created, the CLEC explains to the end user that on a

[36] *See Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, at ¶291 (1999)(citing *Application of BellSouth Corp., et al., for*
(continued)

given day and at a negotiated time the end user's existing service provider will cease its service and shortly thereafter the CLEC will begin its service. The core activity necessary to produce this migration is a deactivation of the existing (i.e., "Old") service provider's service and an activation of the "New" service provider's service. A "hot cut" consists of manually disconnecting the customer's loop in the ILEC central office and reconnecting the loop at the CLEC's collocation space. It also involves coordinated switch software changes at Verizon's switch and the CLEC's switch. The customer is taken out of service while the hot cut is in progress, thereby making the cut "hot," although if the cut is successful, the service disruption will last no more than five minutes.

The Commission must reject Verizon's 271 application because the price for "hot cuts" recently set by the NJ BPU will not permit meaningful competition and thus fails the "public interest" test set out in Section 271(d)(3)(C) of the Act checklist and the rates violate checklist item number 4.[37] No matter how efficient a competitor may be, the price for hot cuts is set at a level that precludes competition.

On December 17, 2001, the NJ BPU released a Summary Order of Approval establishing rates for Verizon's Unbundled Network Elements ("UNEs").[38] For a hot cut that does not require a premise's visit, the rate for a hot cut is $159.76. For a hot cut that

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Provision of In-Region, InterLATA Services in Louisiana, Memorandum Opinion and Order, 13 FCC Rcd 20599, 20655 (1998)).

[37] *See* 47 U.S.C. §§ 271(d)(3)(C), 271(c)(2)(B)(iv). Section 271(c)(2)(B)(iv) provides "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."

[38] *See Board's Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic New Jersey, Inc.*, Docket No. TO00060356 (rel. Dec. 17, 2001).

does require a premise's visit the rate is $233.12.[39] This is in stark contrast to the relevant rate in New York, which is $29.75 for a hot cut regardless of whether a premise's visit is required or not.[40] The Pennsylvania hot cut rate, regardless of the need for a premise's visit is $70.94.[41]

While TELRIC is not determined by a specific formula and state agencies have a degree of flexibility to account for local conditions, there is no conceivable basis to argue that there are differences in local conditions in New Jersey that could justify an approximately 784% increase from rates for hot cuts in New York and approximately 330% increase from rates for hot cuts in Pennsylvania. In fact, nowhere in Verizon's application, does it offer reasons to explain the extreme differences in price for hot cuts in New Jersey as compared to New York and Pennsylvania. Verizon does not even mention the charge for hot cuts in its application. Clearly, Verizon would prefer that the Commission not scrutinize its inflated New Jersey rates. The fact that Verizon makes no attempt to justify these rates shows there is no basis for a finding that they are consistent with TELRIC.

Verizon's hot cut prices are an instance of a "price squeeze," where the monopolist establishes rates for essential facilities in a manner so that a competitor who must purchase the monopolist's facilities cannot compete with the monopolist's retail pricing. Inevitably, a price squeeze stifles competition, and the Commission should not

[39] *See Board's Review of Unbundled Network Elements Rates, Terms and Conditions of Bell Atlantic New Jersey, Inc.*, Docket No. TO00060356 (rel. Dec. 17, 2001), attachment C. The $159.76 rate is comprised of a service order charge of $2.31 and an installation charge of $157.45. The $233.12 charge includes the $157.45 charge plus $73.36 for a premises visit.

[40] *See Verizon New York Tariff No. 10*, § 5.5.2, p. 47, 65.

[41] *See Verizon Pennsylvania Tariff No. 216*, § 3.C.1.g.

enable Verizon to impose its anti-competitive scheme on the industry. A price squeeze occurs when a firm with monopoly power on the wholesale level engages in a price increase that drives competitors out of the retail market allowing the monopolist to extend its monopoly power to the retail market.[42]

As part of its public interest analysis, the Commission must consider whether Verizon is engaging in a price squeeze. The recent decision by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") in the *Sprint Appeal* has clearly established that the Commission should engage in a review of BOC's rates when considering whether to grant 271 authority.[43] In the *Sprint Appeal*, the D.C. Circuit reasoned that since the underlying purpose of the Act is to stimulate competition, "the public interest criterion may weigh more heavily towards addressing potential 'price squeeze.'"[44] The D.C. Circuit continued "to the extent that an agency can confidently identify TELRIC rates only within some band, like those involved under conventional 'just and reasonable' regulation, the possibility exists that the agency has chosen too high a point within the band."[45] Thus, it is clear that the Commission may examine wholesale rates and adjust such rates to the lower level within "the zone of reasonableness."[46] Prior to granting Verizon authority to provide interLATA service, the Commission must adjust Verizon's rates for hot cuts.

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42 *See* Cities of Anaheim v. FERC, 941 F.2d 1234, 1250 (D.C. Cir. 1991). The price squeeze doctrine originated in United States v. Aluminum Co. of America, 148 F.2d 416, 436-48 (2d Cir. 1945).

43 *See* Sprint Communications Co. L.P. v. FCC, Nos. 01-1076, 01-1081-01-1084, 2001 WL 1657297, at *4-*5 (D.C. Cir. Dec. 28, 2001) [hereinafter *Sprint Appeal*].

44 *Sprint Appeal*, 2001 WL 1657297, at *5.

45 *Sprint Appeal*, 2001 WL 1657297, at *4.

The Commission should also recognize that high hot cut prices result in CLECs competing only for the most lucrative customers to the extent that they can compete at all. With hot cut rates set at a level so far above TELRIC, the only way CLECs can compete for customers is to serve those that spend the most on telecommunications services, *i.e.* business customers. Thus, Verizon's high hot cut prices would not serve the public interest because they would thwart competition in the residential market. For these reasons, the Commission may not grant the above-captioned application because of excessive hot cut prices.[47]

V. THE COMMISSION SHOULD REJECT VERIZON'S 271 APPLICATION AS INCONSISTENT WITH THE PUBLIC INTEREST

In determining whether Verizon should receive authority to provide interLATA services, the Commission must find that granting such authority is consistent with the public interest.[48] For a number of reasons, the Commission should find that public interest concerns dictate denying Verizon's application. As detailed below there are a

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[46] *Sprint Appeal*, 2001 WL 1657297, at *4 (quoting *Federal Power Comm'n*, 426 U.S. 271, 279 (1976)).

[47] Apparently, the NJ BPU has conditioned its support of Verzion's 271 application on Verizon using the rates for UNEs set out in the Summary Order. *See* Letter from Henry O. Ogden, NJ BPU, to Bruce D. Cohen, Verizon New Jersey, Inc. (dated Jan. 9, 2002). However, there is no provision for a "Summary Order" in either the NJ BPU's rules or the state Administrative Procedure Act that was used to establish the new UNE prices. Parties will generally follow such orders. There is no time period in which the NJ BPU must issue a "Final Order" and, in fact, there are some summary orders that have been waiting for a NJ BPU "Final Order" for years. In this connection, the time for appeals does not start running until a "Final Order" is issued. Since there is no requirement for the NJ BPU to issue a "Final Order," the time in which Verizon could challenge the UNE rates might come long after its 271 authority is granted. Thus, if the NJ BPU is truly conditioning its support of Verizon's 271 application on adherence to the UNE rates set out in the "Summary Order," the Commission must not grant Verizon 271 authority until the NJ BPU issues a "Final Order" concerning Verizon's UNE rates and Verizon's time to appeal has passed. The situation in New Jersey stands in stark contrast to Rhode Island. In Rhode Island, the Public Utilities Commission had already adopted legally binding rates prior to the time that Verizon filed its Section 271 application although the rates have not yet gone into effect. *See Ex parte* Letter from Clint E. Odom, Verizon Communications, to Ms. Magalie Salas, Secretary, Federal Communications Commission (dated Jan. 2, 2002).

number of areas where Verizon's application fails to meet the public interest test set out in Section 271. Specifically, as detailed above, Verizon's recently approved prices for "hot cuts" in New Jersey are set at level that will force many CLECs to abandon their business plans. Additionally, because of the horrific September 11, 2001 terrorist attacks, Verizon has made a *force majeure* declaration in New Jersey that effectively means Verizon can escape meeting the Section 271 checklist requirements. Verizon also maintains large advantages in serving schools and libraries by virtue of the "Access New Jersey" Program. Finally, Verizon still must remove artificial barriers that it maintains in relation to CLEC-to-CLEC migrations. Until each of these problems is addressed, the Commission must deny Verizon's Section 271 application as inconsistent with the public interest.

A. The Commission Must Deny Verizon's New Jersey 271 Application Until Verizon Ends "Force Majeure" and Returns Operations to "Normal"

Due to the widespread destruction wrought by the September 11, 2001 attack on the World Trade Center, Verizon declared a *force majeure* event in New Jersey. A *force majeure* declaration means that Verizon may be excused from meeting its contractual obligations to XO and other CLECs. While XO does not dispute that the effects of this tragedy have been serious and long-lasting, the Commission should reject Verizon's Section 271 application for the State of New Jersey as inconsistent with Section 271(d)(3)(C) of the Act. It would not be consistent with the public interest to grant an application while Verizon is operating under a *force majeure* declaration. Due to the new telecommunications environment that this terrible tragedy has created, it would be highly

[48] *See* 47 U.S.C. § 271 (d)(3)(C).

inappropriate and arbitrary for the Commission to grant Verizon's 271 application at a time when Verizon contends, in effect, that it is not obligated to comply with any checklist requirements. Since Verizon may stop meeting its contractual obligations with XO and other CLECs, Verizon is not yet in the position to guarantee the performance required under Section 271 of the Act. Under a *force majeure* declaration, Verizon can simply refuse to honor commitments to CLECs and thus thwart the underlying purpose of the Act. If interLATA authority is granted to Verizon, and Verizon subsequently decides to stop meeting its contractual obligations, any complaint initiated by the CLECs filed either with the Commission or the NJ BPU will be countered by Verizon's claim of *force majeure*. This is not mere speculation as XO has already been forced to escalate some service deliveries in New Jersey it normally would not have had to do and was told by Verizon that the service cannot be delivered because technicians are not available to complete the work since they are at Ground Zero. In addition, Verizon is not reporting its compliance with applicable performance standards in New Jersey during the alleged *force majeure* event.

As a matter of fundamental fairness, a section 271 application should not even be considered during a period of a declared *force majeure* event. Such a period is not expected to be representative of the normal state of local exchange competition and cannot accurately be used as a benchmark for evaluating the status of such competition. Consequently, XO asserts that the Commission should not grant Verizon Section 271 authority until after Verizon's *force majeure* declaration is lifted in New Jersey.[49]

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[49] While XO recognizes that there may be situations in the future after Verizon's New Jersey interLATA authority is granted and force majeure is again invoked (e.g., work stoppage), this has no
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B. The Commission Must Not Grant Verizon's 271 Application Until a State Universal Fund is Created and the "Access New Jersey" Program is Eliminated

XO joins the New Jersey Ratepayer Advocate in recommending the creation of a state universal service fund as a precondition to satisfying the public interest requirements of section 271 as a replacement to the Access New Jersey ("ANJ") program.[50]

Although some BOCs have received interLATA authority without a state USF (e.g., Massachusetts and Missouri), no BOC has received interLATA authority for a state with such an anti-competitive program as ANJ in place that has the effect of favoring the ILEC over other competitors. When established in 1997, ANJ was an innovative program, but it now has outlived its usefulness and clearly favors Verizon within the schools and libraries telecommunications market segment. Generally, Universal Service Funds are intended to be competitively neutral and not linked to any one particular service provider. ANJ requires a customer to take service from Verizon in order to receive ANJ discounts, which bestows a powerful market advantage upon Verizon. For example, through the ANJ program 300 hours of ISDN services is offered at a discount of

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bearing on the current situation. Despite the fact that it is impossible to evaluate the likely impact on competition of a potential event at some unknown time in the future, it would occur in a different marketplace environment. Aside from the fact that the competitive market should be more developed at the time that this may occur, the NJ BPU may be involved to control and/or monitor the situation. Currently, Verizon simply invoked *force majeure* and may retain it as long as it sees fit. Contrast such actions with New York where the Public Service Commission granted a limited reprieve on performance standards and payments but have reinstated the incentive plans and reporting requirements effective December 1, 2001. (See PSC Order Issued Nov. 26, 2001 available at http://www.dps.state.ny.us/fileroom/doc10823.pdf)

[50] Access New Jersey was established through an agreement reached in April 1997 by the NJ BPU, Verizon, the Department of Education and the New Jersey Ratepayer Advocate. The program is designed to link K-12 schools and libraries and provides about $130 million in savings over a four-year period (1997 – 2001). In cross-examination, RPA witness Dr. Selwyn testified that there are elements of ANJ that are anti-competitive. (Tr. 1509:16-18.)

72% from Verizon's tariffed rate.[51] Facilities-based CLECs cannot compete with this type of price discount. ANJ must be eliminated prior to granting Verizon authority to provide in-region, interLATA telecommunications services so that all carriers may operate on a level playing field when serving the critical schools and libraries market segment.

Verizon attempts to discount the important advantage it maintains as a result of the ANJ by stating that ANJ discounts are available for resale. However, the fact that ANJ discounts are available only to resellers does not begin to meet the public interest test for 271 authority, given the significant anti-competitive impact the program has on facilities-based carriers and schools and libraries. If a market is truly competitive, no one market player should be able to dictate the terms for market entry for the entire industry. In this instance, Verizon is able to dictate both market entry strategies and product mix for schools and libraries, as well as exclude carriers that are not interested in resale but only in facilities-based competition. The availability of resale is clearly not the "solution" Verizon would like to claim it is and it does nothing to foster competition as intended by the Act. Limiting competitive carriers to serve schools and libraries by reselling ANJ services defeats the purpose of competition that the Act encourages and prohibits facilities-based CLECs from developing new, innovative services for this important market sector so that real competition benefits the marketplace. While schools and libraries can purchase services from a CLEC and use the federal e-rate program to finance the services, it is extremely difficult for such carriers to compete for customers.

[51] *See* New Jersey Department of Education, Access New Jersey (visited Jan. 12, 2002) <http://www.state.nj.us/njded/techno/bpu.htm>.

Verizon obtains a tremendous price advantage because Verizon starts with a discount price, funded by Verizon in exchange for relaxed regulation. When Verizon's new plan for Alternate Regulation is approved by NJ BPU early this year, Verizon intends to apply the federal e-rate discount in addition to the ANJ discount making it even more difficult for CLECs to compete on price for customers in this market.[52] The one customer group that deserves innovative new services and lower costs are schools and libraries, but ANJ makes that possibility less likely. Even if the Commission does not agree that the creation of a state USF is a necessary precondition to granting 271 authority, the Commission must not grant 271 approval prior to the elimination of the ANJ due to its clear anti-competitive impact on an important market segment.

C. The Commission Must Deny Verizon's 271 Application Until Verizon Removes Barriers to CLEC-TO-CLEC Migrations

Verizon's policies and practices regarding migration of customers from one CLEC to another are anti-competitive and provide yet another reason why Verizon's application cannot meet the public interest requirements of Section 271. Verizon requires that CLEC-to-CLEC migrations of New Jersey end users be subject to a "project" process that Verizon has seemingly developed for the sole purpose of creating unnecessary and unreasonable obstacles to the development of competition in the New Jersey local telecommunications services market. For example, Verizon requires XO to contact the National Marketing Center in Newark and initiate a project every time XO wishes to migrate a customer from another CLEC. This increases both the time and costs XO must incur to effect such migrations because of the manual efforts that must be expended to

[52] *See NJ 271 Docket*, at Ex. XO-1.

complete the migration. The initiation of project has the practical result of removing CLEC-to-CLEC migrations from the ordering and provisioning group and to a separate group within the Verizon bureaucracy. Typically, this results in increasing the time associated with a CLEC-to-CLEC migration by seven to ten business days.

The Commission should require Verizon to implement simple, streamlined procedures such as those currently being developed in New York that do not require a project to be initiated to effectuate a migration of a customer from one CLEC to another. While Verizon claims that project initiation allows for continuous service to end users, there are other means to accomplish the same goal that will not have the same detrimental impact on competition in New Jersey.

In order for robust local exchange competition to take hold in the New Jersey marketplace, Verizon must be prevented from developing policies and practices that make it needlessly difficult for end users to switch to carriers of their own choosing. CLEC-to-CLEC migrations are going to become increasingly common and should be encouraged.

Verizon considers the current CLEC volumes of orders to be "substantial activity" because it receives "tens of thousands of orders." Competition cannot develop if the substantial activity of tens of thousands of orders requires that every single order for a CLEC-to-CLEC migration be handled as a separate project by the National Marketing Center. The Commission must not grant Verizon's 271 application until Verizon has adopted simple, streamlined procedures.

VI. CONCLUSION

For the foregoing reasons, the XO urges the Commission to deny Verizon's Application for Provision of In-Region InterLATA Services in the State of New Jersey.

Respectfully submitted,

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Andrew D. Lipman
Patrick J. Donovan
Ronald W. Del Sesto, Jr.
Swidler Berlin Shereff Friedman,
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (Telephone)
(202) 424-7643 (Facsimile)

Counsel for XO Communications, Inc.

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